SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 362

AUGUSTUS P. NORTON, DEPUTY COMMISSIONER FOR THE THIRD COMPENSATION DISTRICT, PETITIONER

vs.

WARNER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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In United States District Court
Eastern District of Pennsylvania

Docket entries.

May 20, 1941—Complaint filed.
May 20, 1941—Summons (2) handed to counsel for acceptance of service.
May 21, 1941—Summons as to Nicholas Rusin returned: "service accepted" and filed.
June 4, 1941—Summons as to A. P. Norton returned: "On May 23, 1941 Served" and filed.
June 5, 1941—Appearance of Maurice S. Levy, Esq. for Nicholas Rusin filed.
June 9, 1941—Answer of Nicholas Rusin filed.
June 10, 1941—Transcript of testimony before Commissioner filed (2 vols.).
July 9, 1941—Hearing sur Bill and Answer.
July 9, 1941—Order of court remanding case to Deputy Commissioner for further proceedings and report.
July 15, 1941—Motion to Dismiss complaint filed.
Aug. 4, 1941—Motion by A. P. Norton to vacate order remanding case filed.
Oct. 24, 1941—Hearing sur motion to vacate order of July 9, 1941. Eo die: Motion denied.
Mar. 24, 1942—Report of Deputy Commissioner pursuant to order entered July 9, 1941.
May 8, 1942—Order to place case on Argument List filed.
2 May 19, 1942—Further hearing. CAV.
June 4, 1942—Testimony filed (1 vol.).
July 23, 1942—Opinion, Kalodner J. granting motion to dismiss filed.
July 23, 1942—Judgment dismissing action filed. 7/24/42 Noted and notice mailed.
July 31, 1942—Defendant's bill of costs filed.
Aug. 26, 1942—Plaintiff's Notice of Appeal filed. Copy to M. S. Levy Esq. & G. A. Gleeson, Esq.
Aug. 26, 1942—Supersedeas bond in $4,000, with Seaboard Surety Co., surety, and order of court approving bond filed.
Sept. 11, 1942—Release of Lien of Judgment filed.
Oct. 5, 1942—Stipulation of counsel that only one copy of record be filed with Clerk of U. S. Circuit Court of Appeals, filed.
Oct. 5, 1942—Appellant's designation of contents of record on appeal filed.

3 In United States District Court

Testimony

Bertram M. Thomas testified that he had been the Marine Superintendent of the Warner Company for 39 years, and that his duties in this position were to direct the operation of the tugboats, lighters, and barges, their loading and discharging, etc., in the port of Philadelphia, Delaware River and tributaries and vicinity.

Bertram M. Thomas, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * * * *

(R. pp. 136 to 138)

Q. On Page 3 (Nov. 15, 1941, direct examination of Nicholas Rusin) of the transcript of this testimony occurs:

"Q. What was your job with the Warner Company?

A. Boatman.

Q. What were your duties as boatman?

A. To make fast the boat, to pull the boat ahead and make it fast.

Q. What kind of boat or boats were you working on?

A. They was wooden boats, a little over 100 feet long.

Q. Where was this lighter in the habit of going, from what place to what place?

A. Go from all over in vicinity, to Wilmington, Chester, all over uptown, 30 miles up, Camden.

Q. All of the places where they went were in the Delaware River?

A. We go to Wilmington, that is as far as we go; the rest is Chester, Camden, New Jersey, Cooper's Creek, Riverside, Morrisville, 30 miles away from here."

4 On page 4 there is this testimony:

"A. On my boat I got $80.00 a month, but on another boat, where there is no man, I am working on this boat for 30¢ an hour.

Q. Did you sleep on your boat?

A. Yes."

On page 7, the testimony of Mr. Rusin recites:

"A. There was no one there at the time I got injured, but before then I had a man helping me with the ropes or lines.

Q. How many are usually on the boat?

A. One man."

And the further answer, on page 6:

"A. I had to heave the capstan to the shore. I heaved the line, and the boat was about 12 feet from the shore, and I had to throw the line from the capstan on the boat to the shore. I had to turn the capstan bar to bring the boat into shore, one side of the boat was fast to shore."

Captain, are those accurate statements, to your knowledge?

A. I would say that is the duty of the man. I don't know what his statements were, but that is the duty of the man. I mean, all of them were in this work.

* * * * * *

(R. p. 139)

A. $80.00 a month was the month's pay for taking care of his own boat. For work he did on other boats, he received 30¢ an hour for.

Q. Is this rate of pay under union agreement?

A. It was made a union agreement in July '37. At that time we were unionized, and the union together with the dele-
5 gates representing the union and the secretary of that union and the Warner Company entered into an agreement, and the workmen accepted it at that time.

* * * * *

(R. p. 144)

Q. Do you know when Mr. Rusin commenced his employment with the Warner Company?

A. 5th month, 6, 1936.

Q. Did you engage him after personal interview?

A. I did.

Q. Did he tell you, and do you remember what he told you, with respect to his capacity?

A. He told me that he was an experienced seaman and worked at that work a good part of his life.

Q. Do you have there any record of the Warner Company of voyages on which Mr. Rusin was aboard a barge?

A. I do.

* * * * *

(R. pp. 153 to 157)

Q. What does the bargeman do?

A. He attended to his own boat. Some of the boats do not have men on.

Q. What do you mean by attending the boat?

A. I mean that he kept it safe, kept it pumped out.

Q. I am talking about the bargeman who lives aboard the barge.

A. That is right.

Q. Is there anything else done further by the bargeman?

A. He keeps it safe, so far as the water is concerned, he keeps it properly tied up.

Q. What do you mean, properly tied up?

A. Well, the rise and fall of the tide, if he had it too close to the wharf, might hang up on the wharf, if the tide went down, and the lines got too tight. He requisitions lines for the boat, keeps it equipped with lines. I am giving a general idea of his duties.

Q. Go ahead, in your own way.

6 A. Reports any leaks, anything that is necessary to keep the boat in a safe condition.

Q. Are there provisions aboard Barge 59 for taking of soundings?

A. Yes.

Q. Barge 59 was Mr. Rusin's barge?

A. Yes.

Q. Do you know whether he did take soundings, or not?

A. I know he kept it free of water in most cases. He must have taken soundings.

Q. When the barge was taken in tow, what would Mr. Rusin's duties be?

A. He would take the lines from the tugboat; he would attach lines to other boats in the fleet that did not have captains on; he would respond to the whistles of the tugboat when it called for men to come up and slack the lines, adjust the lines.

Q. Where would he get his orders from?

A. His orders would come from my office, until he was in tow of the tugboat. Then the tugboat would take him in charge to deliver to where they want it taken.

Q. So far as the navigation part was concerned, who would be in charge?

A. He would be in charge. He would put the lights out; he would attend the lines, and see that the boat was properly tied up when delivering.

Q. He would do what about operating the navigation lights?

A. He was carrying lights for that purpose.

Q. What lights does the barge carry?

A. Two lights—two white lights.

Q. Did he have any duties to move the barge in the absence of a tug, on occasion?

A. He might.

A. He did have occasion to, frequently.

Q. You know that of your own knowledge?

7 A. Absolutely.

Q. Do I understand right that sometimes the Warner Company tow barges in flotilla formation, that is, more than one barge at a time?

A. Usually.

Q. Usually?

A. Usually do.

Q. When that occurs, how many bargemen will you have in the flotilla?

A. Well, that varies; but we try to have at least two, or maybe more, depending upon circumstances.

Q. There may be more barges than the number of bargemen?

A. That is true; that is usually the case.

Q. The bargemen would have charge of the flotilla and its care?

A. Yes.

Q. Was Mr. Rusin ever required to do any shoveling of cargo?

A. No.

Q. Did he have any duties in connection with handling of cargo?

A. No, none whatever.

Q. Did he have any duties off of his boat?

A. Well, on other boats in the fleet.

Q. But his duties were always connected with the boat itself?

A. Always the same kind of work that he did on his own boat.

Q. Those boats were on navigable waters?

A. That is right.

By the DEPUTY COMMISSIONER:

Q. I do not know that it is important, but will you tell me, Captain, in case of some emergency, where there would be a conflict of opinion as to the handling of lines as this flotilla is in

8 motion, would the tugboat captain have the final say as to what should be done, or would that be up to Mr. Rusin?

A. I believe he would. I think the operation is always in charge of the tugboat, taking the lines off the boat and adjusting them as he wants them. I would give the captain of the tugboat authority to demand that the bargeman do what he demands to be done.

Cross-Examination

(R. p. 162)

By Mr. Fortenbaugh:

Q. What does he have to do with navigating it between Philadelphia and Wilmington?

A: He would have to adjust his lines to tow properly. He would have to put out tow lights.

(R. p. 163)

By Mr. Levy:

Q. All he has to do is to see that his lines, or the lines from the tugboat, are connected to his barge; is that correct?

A. That is not all. No, he has to see that the lines from his boat to the next boat are properly adjusted.

Q. All right. And if darkness falls he has to put up two lights on each barge; is that correct?

A. That is right.

Q. That is the extent of his duties in moving the barge from one point to another; isn't that so?

A. And watching to see that it is free of water, to notify the tugboat if it is in trouble.

9 In United States District Court

Opinion

Sur Motion to Dismiss Complaint

Kalodner, D. J.

The issue here is as to whether one Nicholas Rusin, a bargeman employed by the plaintiff, Warner Company, was "a master or member of a crew" within the meaning of the Federal Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U. S. C. A. 901 et seq.

The pertinent provisions of the Act are as follows:

"Sec. 903.

"(a) Compensation shall be payable under this chapter in respect of disability or death of an employee * * *. No compensation shall be payable in respect of the disability or death of—(1) a master or member of a crew of any vessel * * *."

"Sec. 905.

"The liability of an employer prescribed in section 904 of this chapter shall be exclusive and in place of all other liability of such employer to the employee * * *."

Section 902—"Definition"—provides:

"(3) The term 'employee' does not include a master or member of a crew of any vessel * * *."

The Warner Company by Bill of Complaint has appealed from the award made by Augustus P. Norton, Deputy Commissioner for the Third Compensation District, to Rusin, as a result of injuries which Rusin suffered following a fall on board the Warner Company Barge No. 59, while he was engaged in turning the capstan on the barge to draw the vessel by its mooring line to its berth at a Philadelphia pier.

The Warner Company contends that Rusin came within the category of "a master or member of a crew" and was thus not entitled to any award under the provisions of the Longshoremen's Act.

The Complaint, and the motion to Dismiss the Complaint, agree that the single question before the court is that of the jurisdiction under the Longshoremen's Act.

The facts as summarized in the original findings of the Commissioner are as follows:

"On March 11, 1938 said claimant while performing services for the employer upon the navigable waters of the United States, sustained personal injury resulting in his disability while he was employed as a boatman on Barge No. 59, then afloat on the waters of the Schuylkill River near Christian Street in said Philadelphia;

"That his duties consisted of general care of the barge or lighter to which he was at any time assigned, including making lines fast and unfast at docks and tightening or slackening them as necessary; that he had no other duty in connection with the operation of said vessels; that the vessel on which he was injured had no motive power of its own; that it was propelled either by towing or, for shorter distances, by winding up a cable by means of a capstan operated by hand; that the movements of the barge were confined to waters in the Schuylkill and Delaware Rivers within about 30 miles of the plant of the employer in Philadelphia; that he was the only person employed aboard the barge at the time of his injury;

"That on said date claimant was engaged in moving to a pier by means of a hand capstan the barge on which he was employed; that he succeeded in propelling it the greater part of the required distance against some difficulties of wind and tide, in addition to the weight of the boat; that the capstan bar then pulled out striking him in the chest."

The itinerary of Rusin's barge at various times covered ports of call in Pennsylvania, New Jersey and Delaware;
11 the Delaware, Schuylkill, Christiana, Cooper and Rancocas Rivers; and included trips sixty miles in length, which sometimes took fifteen days between loading and discharging, although the barge was not actually under way except for a fraction of the time—i. e. for periods of fifteen or sixteen hours. The barge never went to sea. Rusin was continuously aboard. He lived, ate and slept on the barge, and bought his own meals. He was paid $80 a month. When he worked on any other boat he would get an additional 30¢ per hour.

Rusin worked under a Union Contract between the Harbor Boatmen's Union and the Warner Company wherein it was provided:

"SECTION 6: All Bargemen assigned to specific barges in active operation shall be paid a monthly salary of $80.00 and shall be provided with quarters. This compensation is for all work performed by Bargemen in the operation of his own vessel.

"SECTION 7: The rates as provided herein are based upon all services and time required to safeguard and operate the barge fleet, including necessary pumping, watching, or other emergency duties on Sundays and holidays."

Rusin's duties were limited to his own barge and its safekeeping. Amplifying the Commissioner's findings as quoted above, it may be said that he had the duty of changing the mooring lines as necessary; repairing leaks; pumping; taking lines from the tug boats; responding to whistle signals; slackening lines; putting out navigational lights and signals, and taking general orders from the tugboats as necessary. The barge had no motive power and no wheel, and Rusin, as bargemaster, was entirely subject to the control of the tugboat captain, and could not set his own course or control or change it at any time.

When the matter was heard before me on the Motion to
12 Dismiss, and in accordance with my direction, Rusin testified as to his prior experience as a boatman or seaman. It was agreed by the parties that this testimony should be treated as supplementing the record made by the Commissioner.

Rusin testified that before he was employed by the Warner Company, his occupation was that of a painter; that he had been a painter for about thirty-five years; that he had never served as a master or officer; that he had never had any seamen's or master's certificates or papers of any kind; that in 1908 he had worked as a seaman on a Merchant and Miners vessel plying between Philadelphia and Boston for about six months; that in

1930 he had worked on a dredge owned by the United States Engineering Department along shore for "a couple of months." He was employed by the Warner Company for about two years, from mid-1936 to mid-1938. When he left the Warner Company in 1938 he was employed intermittently as a painter by Girard College in Philadelphia for about two years. He was re-employed by the Warner Company about three months before the accident.

While the plaintiff in its brief (p. 6) described Rusin as "an experienced seaman, having spent most of his life in that occupation prior to being employed by the Warner Company," there was no testimony offered by the plaintiff in support of that contention.

The sum and substance of the testimony then is that Rusin was employed as a bargeman with duties substantially similar in nature to the bargemen in De Wald v. Baltimore & O. R. Co., 71 F. 2d 810; Diomede et al. v. Lowe, Deputy Commissioner, 87 F. 2d 296; The A. H. Chamberlain, 206 F. 996, 998; South Chicago Coal & Dock Co. et al. v. Bassett, Deputy Commissioner, 309 U. S. 251, 60 S. Ct. 544, 84 L. Ed. 732; Loverich v. Warner Co., 118 F. 2d 690, 694, cert. denied 313 U. S. 577, 61 S. Ct. 1104, 85 L. Ed. 1535.

In all of the cases cited, with the exception of Loverich v. Warner Co., supra, it was held that the barge masters
13 did not come within the category of "a master or member of a crew" and hence were subject to the exclusive jurisdiction of the Longshoremen's Act.

In the Loverich case, the United States Circuit Court of Appeals for this Circuit ruled that the bargemen employed upon one of the Warner Company barges of the same type as that involved in the instant proceeding came within the category of "a master or member of a crew" and was therefore exempt from the scope of the Longshoremen's Act, and allowed him to recover in admiralty.

In Berwind-White Coal Mining Co. v. Rothensies, 45 F. Supp. 55, 60 (decided May 15, 1942), in which the question involved was whether "barge captains" were exempt from social security taxes "as an officer or member of the crew", I ruled that the barge captains performing substantially the same duties as the bargeman in the instant case, were not exempt.

In my opinion, I discussed in detail the history of the Longshoremen's Act and the decision thereunder. I there pointed out that the Loverich case turned largely on the fact that the bargeman was an experienced, qualified seaman, as stated in the opinion of the Circuit Court at p. 694:

"He was not a mere watcher of a coal chute * * *. He was a licensed junior engineer and water tender and qualified as an

able seaman and barge master, 2nd mate and 3rd mate. * * * he operated the entire barge, whose voyages sometimes took six weeks. He was, therefore, in our judgment, not a harbor worker, but a seaman."

Since the bargeman in the instant case was not an experienced, qualified, licensed or certificated seaman, I am of the opinion that the ruling in the Loverich case is not dispositive on the question here involved.

It is important to note that the Circuit Court of Appeals in the Loverich case specifically noted that the fact situation
14 there was an "exception" such as was explained and applied by the Supreme Court of the United States in South Chicago Coal & Dock Co., et al. v. Bassett, Deputy Commissioner, supra.

In Berwind-White Mining Co. v. Rothensies, supra, I pointed out that in its opinion the Supreme Court of the United States in the South Chicago Coal & Dock Co. case, in discussing the legislative history of the Longshoremen's Act, stressed the fact that it was at one time amended so as to include a master and members of a crew of a vessel; that later the bill was amended so as to exempt "seamen"; that in final pasage, however, the words "master or member of a crew" were substituted for "seamen".

Referring to this final change, the court said at page 257 of 309 U. S., at page 547 of 60 S. Ct., 84 L. Ed. 732:

"* * * We think that this substitution has an important significance here. For we had held that longshoremen engaged on a vessel at a dock in navigable water, in the work of loading or unloading, were 'seamen'. International Stevedoring Co. v. Haverty, 272 U. S. 50, 47 S. Ct. 19, 71 L. Ed. 157; Northern Coal & Dock Co. v. Strand, 278 U. S. 142, 49 S. Ct. 88, 73 L. Ed. 232. And, also, that such seamen if injured on a vessel in navigable waters, unlike one injured on land, could not have the benefit of a state workmen's compensation Act. Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 S. Ct. 524, 61 L. Ed. 1086 L. R. A. 1918C, 451, Ann. Cas. 1917E, 900. We think it is clear that Congress in finally adopting the phrase 'a master or member of a crew' in making its exception, intended to leave entitled to compensation all those various sorts of longshoremen and harbor workers who were performing labor on a vessel and to whom state compensation statutes were inapplicable."

In Nogueira v. New York, N. H. & H. R. Co., 281 U. S. 128, 50 S. Ct. 303, 74 L. Ed. 754, the Supreme Court also pointed out the changes made in the Longshoremen's and Harbor Workers' bill.

15 The phrase "master or member of a crew" was interpreted in the case of De Wald v. Baltimore & O. R. Co., 71 F. 2d 810 (1934). In this case the Circuit Court of Appeals for the Fourth Circuit held that a bargeman whose functions were very similar to the barge captains in Berwind-White Coal Mining Co., supra, did not come within the meaning of the phrase "master or member of a crew." The bargemen's duties in the De Wald case consisted of the checking and supervising of the loading and unloading of cargoes from the barge to steamships, and vice versa; seeing that the cargo was safely loaded and unloaded; opening and closing hatches on the barge, and putting in gangway boards; pumping water out of the barge, and making lines fast and unfast at docks or alongside vessels when the barge was moved about the harbor. The bargeman was not responsible for the navigation of the barge, and performed no duty in connection with such navigation, except the incidental one of making lines fast or unfast when tying up at docks or alongside vessels. The barges had no motive power equipment or steering apparatus, and were towed by tug boats.

Said the court, in ruling that the bargeman was not "a master" or "member of a crew," at page 813 of 71 F. 2d:

"Obviously De Wald was not a master. The A. H. Chamberlain, D. C., 206 F. 996. The judge below readily reached this conclusion. Nor in our opinion was he a member of a crew. He was the only man working on the barges in any capacity. 'Crew' is a collective noun and signifies 'the ship's company'. The Marie, D. C., 49 F. 286; Seneca Washed Gravel Corporation v. McManigal, 65 F. 2d 779; United States v. Winn, 28 Fed. Cas. p. 733, No. 16,740."

In Diomede et al. v. Lowe, Deputy Commissioner, 87 F. 2d 296 (1937), the employee involved was in entire charge of a non self-propelled dump scow. He lived on board the scow, which
16 was operated within New York Harbor, and occasionally outside the Harbor. His duties consisted of the loading and dumping operations of the scow; watching for leaks; making minor repairs; pumping out water; fastening and unfastening lines from the scow to the dock and from the tug boat to the scow, and keeping running lights in order and visible.

The Circuit Court of Appeals for the Second Circuit held in the Diomede case that the employee could not be classified as a "master" because he had no men to command and no ship to navigate; and further, that he was not a "member of a crew" because he was not aiding in navigation.

Said the court at page 298 of 87 F. 2nd:

"In the A. H. Chamberlain, D. C. E. D. N. Y., 206 F. 996, 998, in a well-considered opinion, the District Judge said, speaking of the status of one who was in charge of a scow: 'The captain of a scow or barge, who does the work of a deckhand, and does not have the right to control the vessel's movements nor employment, and can act only as agent, in the sense that any sailor might act under specific direction of his captain, is not a master.'

"We agree and think it is impossible to classify an employee in charge of a dump scow, a boat without means of self-propulsion, and unmanned except for its 'captain,' as the master of a vessel. De Wald v. Baltimore & O. R. Co., supra. A 'master' without men to command, without a ship to navigate, and subject to the orders of the tug captain when the scow is in tow, is a notion difficult to accept and untenable when it is sought thereby to exclude the decedent from the remedy provided by the Act.

"Nor was the decedent the member of a crew. * * * The word "crew" is used in the statute to connote a company of seamen belonging to the vessel, usually including the officers.
17 It is the "Ship's company." United States v. Winn, 28 Fed. Cas. page 733, No. 16,740. The crew is usually referred to and is naturally and primarily thought of as those who are on board and aiding in the navigation without reference to the nature of the arrangement under which they are on board. The Bound Brook, D. C., 146 F. 160, 164; The Buena Ventura, D. C. 243 F. 797, 799.'"

In Moore Dry Dock Co. v. Pillsbury et al., 1938, 100 F. 2d 245, the Circuit Court of Appeals for the Ninth Circuit cited with approval the ruling in Diomede v. Lowe, supra, and De Wald v. Baltimore & O. R. Co., supra.

In Blaske v. Bassett, 35 F. Supp. 315, 316, the court distinguished between the "sort of work performed by longshoremen and harbor workers * * * and the duties of those employees on a vessel who are naturally and primarily on board to aid in the navigation of the boat," and ruled that a man performing substantially the same duties as the bargeman in the instant case came within the jurisdiction of the Longshoremen's Act and was not "a master or member of a crew."

For the reasons above stated, I am of the opinion that the bargeman Rusin in the instant proceeding did not come within the category of "a master or member of a crew," and accordingly the Motion to Dismiss the Complaint is granted.

18 In United States District Court

Judgment

Filed July 23, 1942

Before KALODNER, J.

And now, to wit: July 23, 1942, in accordance with the Opinion of the Court granting defendant's Motion to Dismiss, it is

Ordered that the above action be and the same is hereby dismissed, with costs to the defendants.

By the Court:

Attest:

(S) GILBERT W. LUDWIG,
Deputy Clerk.

19 In the United States Circuit Court of Appeals
for the Third Circuit

No. 8131—October Term, 1942

WARNER COMPANY, APPELLANT

vs.

AUGUSTUS P. NORTON, DEPUTY COMMISSIONER FOR THE THIRD COMPENSATION DISTRICT, AND NICHOLAS RUSIN, APPELLEES

Minute entry

And afterwards, to wit, the 20th day of November 1942, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Albert B. Maris, Honorable Charles Alvin Jones, and Honorable Herbert F. Goodrich, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 17th day of June 1943, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

In the United States Circuit Court of Appeals
for the Third Circuit

No. 8131—October Term 1942

WARNER COMPANY, PLAINTIFF-APPELLANT

v.

AUGUSTUS P. NORTON, DEPUTY COMMISSIONER FOR THE THIRD COMPENSATION DISTRICT, DEFENDANT-APPELLEE

and

NICHOLAS RUSIN, DEFENDANT-APPELLEE

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

Opinion

(Filed June 17, 1943)

Before MARIS, JONES, and GOODRICH, Circuit Judges

JONES, Circuit Judge.

This is an appeal by an employer from an order of the District Court dismissing its suit to set aside an award of compensation entered by the Deputy Commissioner under the Federal Longshoremen's and Harbor Workers' Compensation Act,[1] in favor of an employee for injuries received while employed as a bargeman. The ultimate question is whether the employee was "a master or member of a crew" of a vessel within the meaning of the Act which expressly excludes from its purview, inter alia, "A master or member of a crew of any vessel * * *" 33 U. S. C. A. § 903. The Commissioner, on the facts found by him, concluded that the claimant was a harbor worker and not a master or member of a crew and that he was therefore entitled to the benefits of the Compensation Act. The District Court ruled to like effect.

In reviewing the action of the court below we necessarily take as conclusive the facts as found by the Commissioner in so far as they are supported by substantial evidence. South Chicago Coal & Dock Co. v. Bassett, 309 U. S. 251, 253, 258. At the hearing upon the employer's complaint, the District Court took additional evidence but, in the end, accepted the Commissioner's findings of

[1] 44 Stat. 1424, c. 509, § 3, 33 U. S. C. A., § 903 et seq.

fact in toto, merely amplifying them in certain particulars as the additional evidence, which was received with the consent of all parties, consistently warranted. The evidentially supported basic findings, as to the merit of which there is no controversy, disclose the following factual situation.

The claimant suffered the injuries for which he seeks compensation from a fall while employed on a barge of the Warner Company on navigable waters of the United States. As the Deputy Commissioner specifically found, the fall was occasioned by the pulling out of a hand-operated capstan on deck which the bargeman was engaged in turning to take up the mooring line running from the barge to a pier to which he was endeavoring to warp the vessel. At the time of his injury he was the only person aboard or employed upon the barge. He had succeeded in propelling it the greater part of the distance of the desired movement against difficulties of wind and tide, which were augmented by the weight of the barge, when the capstan bar pulled out, struck him on the chest and caused him to fall, whereby the injuries for which he makes claim were inflicted.

The barge was a documented vessel under the Customs Laws of the United States. It had no motive power of its own and was propelled ordinarily by being towed by a tugboat to ports of call on navigable inland waters of the United States within a radius of thirty miles of the employer's plant in Philadelphia. It was also customary for the bargeman to propel the barge for short distances by winding up a mooring or towing cable by means of the hand-operated capstan.

The duties of a bargeman embrace the care of his barge by repairing leaks, pumping out excess water and seeing in general as to the seaworthiness of the vessel. For that purpose he lives aboard the barge, eating and sleeping in quarters there provided for his use and supplying his own food. It is also his duty to make fast and to unfasten mooring lines at dock and to change them as necessary by tightening or slackening them, to take
21 tow lines from tugboats and to lengthen or slacken them when necessary, to set out navigational lights or signals, to respond to whistle signals from the barges tow boat and to take orders from the tugboat captain to whose control the bargeman is subject while his barge is in tow. Rusin, the claimant, was paid a flat monthly salary for his service as bargeman and, when he worked on any other boat, he received additional compensation at an hourly rate for the time so engaged. His employment was subject to the provisions of a contract between the Harbor Boatmen's Union and the Warner Company wherein it was provided, inter alia—

"SECTION 6. All Bargemen assigned to specific barges in active operation shall be paid a monthly salary of $80.00 and shall be provided with quarters. This compensation is for all work performed by Bargemen in the operation of his own vessel.

"SECTION 7. The rates as provided herein are based upon all services and time required to safeguard and operate the barge fleet, including necessary pumping, watching or other emergency duties on Sundays and holidays."

While the question as to whether a particular claimant is "a master or member of a crew" of a vessel and therefore excluded from the Compensation Act is one of fact, it is necessarily an ultimate conclusion to be derived from an application of the statute to the basic findings of fact. As such, it is open to court review for a determination of its validity on the basis of the supportable facts as found by the Commissioner. In short, a Commissioner's conclusion that one is or is not "a master or member of a crew" is not binding upon a reviewing court if the basic facts competently found by the Commissioner rightly call for a different conclusion.

In Loverich v. Warner Co., 118 F. 2d 690 (C. C. A. 3), cert. den. 313 U. S. 577, we sustained a bargeman's claim against the same employer, as is here involved, for maintenance and cure under maritime law for an illness consequent upon an accident occurring in the course of the claimant's employment. In so doing, we expressly ruled that the bargeman was a seaman and not a harbor worker, and that his claim against the employer fell within the specific exclusion in the Compensation Act. This ruling was directly material to the decision in the Loverich case, for not otherwise could the libellant's judgment for maintenance and cure have been sustained in its entirety. The employer had there defended on the ground that so much of the libellant's claim as had accrued after the effective date of the Compensation Act was compensable under that statute, as, indeed, it would have been had the claimant not been held to have been excluded by that Act. To employees entitled to the benefits of the Longshoremen's Compensation Act the remedy thereby afforded is exclusive. South Chicago Coal & Dock Co. v. Bassett, supra, at p. 256.

The court below sought to distinguish the Loverich case from the present and held the ruling there made to be inapplicable to the instant case. We fail to see any material differences in the facts of the two cases. It is true that in the Loverich case,
22 in specifying the duties of the bargeman and the circumstances under which he performed them, we mentioned that Loverich was a licensed junior engineer and qualified as an able seaman, barge master and second and third mate. But those added attainments of the particular employee were not what con-

stituted him a seaman. The determining factors were the duties he was called upon to perform and the circumstances under which he was required to perform them. The question concerned his actual duties. Cf. South Chicago Coal & Dock Co. v. Bassett, supra, at p. 260. Where such duties pertain to the welfare and operation of the vessel, the employee is a seaman and, as such, is the master or a member of the crew of the vessel, as the case may be. Cf. Gale v. Union Bag & Paper Corporation, 116 F. 2d 27, 28 (C. C. A. 5), where the navigational character of a bargeman's duties is clearly set forth. See also A. L. Mechling Barge Line v. Bassett, 119 F. 2d 995, 998, where the Court of Appeals for the Seventh Circuit, whose earlier decision in the South Chicago case (104 F. 2d 522) was affirmed by the Supreme Court, as cited supra, held a cook on a barge to be "a member of a crew", and therefore excluded from the Longshoremen's and Harbor Workers' Compensation Act, since his services were in aid and support of the navigation of the barge and not independent thereof. On the other hand, if the employee is concerned primarily with the loading or unloading of the vessel, even though he works upon navigable waters, he is a harbor worker and not a seaman. "Workers of that sort on harbor craft may appropriately be regarded as 'in the position of longshoremen or other casual workers on the water.'" South Chicago Coal & Dock Co., supra, at p. 260, citing Scheffler v. Moran Towing Co., 68 F. 2d 11, 12. The distinction thus indicated was fundamental to our ruling in the Loverich case whose facts as to the employee's duties and services aboard the barge are indistinguishable from the facts of the instant case.

In the South Chicago case, supra, the matters which were deemed (p. 260) to justify the Commissioner's conclusion that the claimant in that case was not a "master or member of a crew" were that his primary duty was to facilitate the flow of coal to the vessel being fueled from the lighter upon which he worked, that he had no duties while the lighter was in motion, that he slept at home and boarded off ship and that he was called for service each day as wanted and was paid an hourly rate. Some of the same restricted characteristics of employment are to be noted in DeWald v. Baltimore & O. R. Co., 71 F. 2d 810, 811 (C. C. A. 4), Moore Dry Dock Co. v. Pillsbury, 100 F. 2d 245 (C. C. A. 9), and Henderson v. Jones, 110 F. 2d 952 (C. C. A. 5). On the other hand, in the instant case, just as in the Loverich case, the claimant's duties required him to be aboard the barge and to be concerned with its management, care, and operation. He was therefore a seaman and, as such, comes within the description of those who, as master or member of a crew, are expressly excluded from the remedy provided by the Compensation Act.

23 The judgment of the District Court is reversed and the cause remanded for further proceedings in conformity with this opinion.

A true Copy:
Teste:

_____,
Clerk of the United States Circuit Court of Appeals for the Third Circuit.

In the United States Circuit Court of Appeals for the Third Circuit

No. 8131—October Term, 1942

WARNER COMPANY, APPELLANT

vs.

AUGUSTUS P. NORTON, DEPUTY COMMISSIONER FOR THE THIRD COMPENSATION DISTRICT, AND NICHOLAS RUSIN, APPELLEES

Present: MARIS JONES, and GOODRICH, Circuit Judges

On appeal from the District Court of the United States for the Eastern District of Pennsylvania

Judgment

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, and the cause is remanded to the said District Court for further proceedings in conformity with the opinion of this court.

By the Court,

JONES, *Circuit Judge.*

JUNE 17, 1943.

[Endorsements:] Order Reversing Judgment, etc. Received & Filed June 17, 1943. Wm. P. Rowland, Clerk.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, Set.

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appendix to Brief for Appellant, as constituting the portions of the record before

this court at argument; and proceedings in this court, in the case of Warner Company, Appellant vs. Augustus P. Norton, Deputy Commissioner for the Third Compensation District, and Nicholas Rusin, Appellees, No. 8131, on file, and now remaining among the records of the said Court in my office.

24 In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 9th day of September in the year of our Lord one thousand nine hundred and forty-three, and of the Independence of the United States the one hundred and sixty-eighth.

WM. P. ROWLAND.
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

In the Supreme Court of the United States

[Title omitted.]

Stipulation

Subject to the approval of this Court, it is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that, for the purpose of the petition for a writ of certiorari, the printed record may consist of the following:

Appendix to the brief for appellant filed in the United States Circuit Court of Appeals for the Third Circuit and the proceedings in that court.

It is further stipulated and agreed that the petitioners will cause the Clerk of the United States Circuit Court of Appeals for the Third Circuit to certify and file the entire transcript of the record now on file in his office with the Clerk of this Court, and that in the event the petition for a writ of certiorari is granted, the printed record shall consist of the proceedings in the United States Circuit Court of Appeals for the Third Circuit and such portions of the entire transcript of the record, certified by the Clerk of that Court, as the respective parties may designate.

It is further stipulated and agreed that the parties may refer in the petition and briefs to any portions of the certified typewritten transcript of record which are not included in the printed record to be filed in accordance with this stipulation.

_____
Solicitor General,
Counsel for Petitioners.

Dated: September —, 1943.

_____
Counsel for Respondent.

Dated: September —, 1943.

25 In the Supreme Court of the United States

[Title omitted.]

Stipulation

Subject to this Court's approval, it is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that, for the purpose of the hearing of this case, the printed record may consist of the following:

Appendix to the brief for appellant filed in the United States Circuit Court of Appeals for the Third Circuit and the proceedings in that court.

It is further stipulated and agreed that either party may refer in his brief or oral argument to any portions of the certified typewritten transcript of record, filed with this Court, whether or not they are included in the printed record.

CHARLES FAHY,
Solicitor General,
Counsel for Petitioners.

Dated: December 4, 1943.

SHIELDS, CLARK, BROWN & MCCOWN,
S. B. FORTENBAUGH, JR.
Counsel for Respondent.

Dated: December 7, 1943.

26 Supreme Court of the United States

Order allowing certiorari

Filed November 8, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] Enter Attorney General. File No. 47855. U. S. C. C. of Appeals, Third Circuit. Term No. 362. Augustus P. Norton, Deputy Commissioner for the Third Compensation District, Petitioner vs. Warner Company. Petition for writ of certiorari and exhibit thereto. Filed September 17, 1943. Term No. 362 O. T. 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1943